Supreme Court
FILED
DEC 5 1901
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES.

3 Orig'l.

O. T. 1901

STATE OF KANSAS,
Complainant,
vs.
STATE OF COLORADO,
Defendant.

Original Proceeding No. 3

BRIEF OF DEFENDANT IN SUPPORT OF ITS DEMURRER.

CHARLES C. POST,
Attorney General of Colorado.

CHARLES S. THOMAS,
LUTHER M. GODDARD,
PLATT ROGERS,
HENRY A. DUBBS,
Of Counsel.

THE SMITH-BROOKS PTG. CO., DENVER.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

STATE OF KANSAS,
Complainant,
vs.
STATE OF COLORADO,
Defendant.

Original Proceeding No. 10.

BRIEF OF DEFENDANT IN SUPPORT OF ITS DEMURRER

May it please the court:

The preparation of a brief and argument in support of the demurrer was delegated to two of the counsel appearing for the State of Colorado. They prepared separate briefs, with the idea of finally merging them into one, but upon reading them it was thought by remaining counsel that each presented the subject in such a distinct way that no satis-

factory merger could be secured, and that the importance of the questions presented and the necessity of throwing all possible light upon the issue, justified printing each production in its entirety. We, therefore, offer both briefs, in the hope that the court will find the two neither burdensome nor confusing. This will explain the instances in which the same subject is twice discussed.

Analysis of the Bill.

The State of Kansas invokes the original jurisdiction of this court to obtain relief on a case stated against the sovereignty of Colorado.

What that relief is will be best apprehended by an inverse statement of the bill; its prayer and then its narrative.

It first prays a decree against the State of Colorado to prohibit it from granting or permitting to be granted hereafter any charter or authority to any individual or corporation for the diversion of any of the waters of the Arkansas river or any of its tributaries from their natural beds within the state except for domestic use. And, second, from granting any right to extend or enlarge any existing canal. Or from the construction and operation of any canal in addition to those already constructed.

It then prays that the state may be prohibited from constructing or operating any canal which shall divert any of the waters of the river or its tributaries; and, secondly, from constructing or operating any reservoir for the storage of the waters of the river for the purpose of irrigation.

Thirdly, it prays that the State of Colorado may be prohibited from granting to any person or corporation the extension of any license or charter already granted for the diversion of the waters of the river or its tributaries for the purpose of irrigation or for the continuance of the diversion after the charter or authority heretofore granted may have expired.

This is the specific relief which the State of Kansas prays. It is followed by the usual general prayer whereunder, of course, no relief can be granted save that which may be consistent with the specific prayer.

The narrative which the plaintiff has spread on the record as the basis for this extraordinary relief will now be stated. The statement will be confined to what the demurrant conceives are its essentials.

It gives a somewhat detailed history of the Arkansas river, its sources and its course. Originally the territory of Kansas included these sources, and the whole course of the river and all its tributaries to the point where it now leaves that state. The valley of the river as it exists in Kansas is said to embrace 2,500,000 acres of land of great fertility. It is charged that there are three sorts of land which would be benefited by the flow of water in the river; the first is what is known as riparian land; the second what is known as bottom land, watered by the subterranean underflow of the waters of the river which may percolate through it; third, the upland, which furnishes pasture for cattle that may drink at the river.

It charges that a good deal of the land along the course of the river had been settled and occupied prior to the admission of the state in 1861.

At the time of admission it is averred that certain sections, 16 and 36 of each township, were granted to the state by the general government, for school purposes. We are not advised by the bill as to how much of that land, or whether any, would be embraced within the legal definition of riparian lands. It is only charged that a number of the sections adjoin the bed of the stream, which is no allegation of either riparian location or ownership.

Respecting the exact charge of ownership of riparian lands, and, therefore, of damage to the property rights of

Kansas, we have allegations only of an ownership of the tract of land of about one hundred and twenty-seven acres in Ford county, which the State of Kansas bought of the general government under an act of congress in the year 1889.

The only other tract specifically described as being the property of Kansas and damaged by the appropriations of the defendant State is a tract of six hundred and forty acres in Reno county, on which an industrial reformatory has been built. According to the averments, this land is not riparian land, but is bottom land in the valley of the river, as it is stated, and watered wholly from the underflow, whatever that may be.

Departing from the order of averment, the bill charges that in 1854, while the territory of Kansas extended to the summit of the Rocky mountains, the common law of riparian rights extended over the whole valley. We are not advised by the bill whether this is an allegation of fact resulting from legislation or whether it is assumed as a conclusion of law, because of the source of the title to the land as it was then enjoyed by the territory of Kansas. The demurrants are not advised as to the basis of the charge in any event because the source of the title and the law of the original sovereignities, Louisiana, Texas and Mexico, are not charged.

Recurring to the narrative, it is needful only to state generally that the complainant has set up the constitution of Colorado and its provision that the waters of the state belong to the people, and are subject to appropriation by the citizens in the constitutional order of domestic, agricultural and mining purposes. It is further charged that the state has pursued the policy of permitting the appropriation of water for the purpose of irrigation as well as domestic and mining use, and that the state has passed numerous laws for the protection of those rights of appropriation. It is also charged that the state itself has built a large canal for the irrigation

of lands belonging to it, and is appropriating a large amount of water by means of this canal. The policy of the state is further illustrated by the charge that the rights of these appropriators are being constantly extended by acts of the legislature, by appropriations under the general statute, and that the State of Colorado itself is about to build other canals which will increase the appropriation of water. The building and construction of reservoirs is also alleged, which the complainant says tends likewise to diminish the flow of water in the river.

With the description of the Arkansas river it is averred that the river is navigable below Fort Gibson for the purpose of commerce. But it is also charged to be navigable through the state of Kansas by virtue of the laws and regulations of the department. What that may mean it is difficult to conceive, for navigable by law or by department regulation might be for a birch bark canoe or for a double-turreted battleship. It means nothing. Navigability is a well understood word, and navigability by regulation does not, as it is conceived, enlarge the complainant's rights.

The whole bill is then concluded with a general allegation of damage and the specific damages pointed out as consisting of the diminution of crops, the destruction of fertility, the danger of complete aridity in the valley and the destruction of the pasture lands because of the lack of water for the herds.

The Demurrer.

To this bill the state of Colorado demurred on ten several grounds.

1. Lack of jurisdiction of parties and subject matter.

2. The controversy is between the State of Kansas and persons who are not parties.

3. Because the suit is in reality for certain individuals to whom the State of Kansas is loaning its name, being only a nominal party.

4. Because the suit is brought to redress the wrongs of private citizens.

5. Because it involves no property rights of the State of Kansas.

6. Because the acts complained of are the acts of individuals in the State of Colorado who are not parties.

7. Multifariousness.

8. Justification in the national legislation.

9. The same principle in different form.

10. The insufficiency of the bill.

POINTS AND ARGUMENT.

In discussing some of the propositions, the status of the two states, the character of the title which they hold to the lands within their limits, and congressional legislation which is undoubtedly operative during territorial existence and as to all lands within the limits of the sovereignty up to the time when the government parts with its title, is of importance.

Kansas was organized as a territory in 1854, and all, or at least the major portion, of what is now the State of Colorado, was within the limits of the territory as it was then organized. It was admitted as a state in 1861, at which time the territory of Colorado was set off and provided with a territorial government.

12 *U. S. Statutes,* 172.

We are unable to state from the terms of the bill, to which alone we may refer, the exact date at which title was acquired by Kansas to the lands which belonged to the general government at the time it was admitted as a state in 1861. We therefore have a right to assume, for the purpose of this argument, that Kansas got no title at that date to the specific lands now owned by the state and which they claim have been and will be damaged by the maintenance of the canals, reservoirs and ditches within the limits of Colorado.

This is true because as to the one hundred and twenty-seven acres in Ford county the complainant avers that the acquisition of title was in June, 1889. Respecting the other six hundred and forty acres, the averment is that the title passed pursuant to the act of congress passed March 1, 1863, granting title to lands to aid in the construction of railroads. It nevertheless appears that the title did not pass until 1873, for the complainant avers April 9, 1873, as the date of location and certification and the patent as the 19th of May, 1873, to the railroad company.

It is also alleged that the date when Kansas got title to the odd numbered sections located east of the west line of Ford county was somewhere about 1874, but as to all of the odd numbered sections west of the line of Ford county, between 1873 and 1874.

All these matters are important for the purpose of illustrating the proposition which will be insisted upon of the importance and force and effect of congressional legislation.

In the development of the argument it will be probably wise to dispose of some apparently unimportant propositions with which the narrative is filled and on which the complainant possibly relies.

POINT I.

It will be assumed, for the purposes of the discussion, that the Arkansas river, as a stream, from its source at Tennessee Pass north and west of Leadville, in the Rocky mountains, to the point from which it departs from the furthermost limit of the state of Kansas, is non-navigable. If Kansas has any rights which it can enforce, either in its behalf or on behalf of its citizens, it must be because that state and its people live on the banks and own land through which a non-navigable stream runs. The averment that the river is navigable, under the law or department regulations, is an insufficient charge of the fact of navigability. What that is the cases well define. The stream must be of the size and of the significance and of the importance necessary to the carrying on of commerce along its course and on its bosom. It will be assumed this stream is not thus navigable, notwithstanding what the bill says, because this court will take judicial notice of the character of that stream and its navigability. This principle is well settled.

The Montello, 11 Wallace, 411.
U. S. vs. Lawton et al., 5 Howard, 10.
Peyroux et al. vs. Howarth, 7 Peters, 324.
Hilliker vs. Coleman, 41 N. W., 219.
Commonwealth vs. King, 150 Mass., 221.

We therefore assume this court knows the Arkansas river is navigable in no part of its course within the limits of Colorado and Kansas. That state, then, is relegated to whatever rights it may enjoy because it or its citizens who live on the banks of the stream are riparian owners. The sole question is, in this aspect of the case, whether Kansas or its citizens, either one or both, can invoke the principle

Aqua currit et debet currere solebat.

POINT II.

Policy of Government Concerning Irrigation.

The river being non-navigable is without the jurisdiction of congress, save as the legislation preceding the admission of Kansas as a state and preceding the passage of the title from the government to the state or to its citizens affected the riparian rights of the government as owner of the land through which it flowed.

The title of the two tracts now owned by the state did not pass until after the congressional legislation, which will be referred to, and while the title of the land was in the general government.

It is also true, so far as we are advised by the terms of the bill, that all the land having riparian rights (if at all) was owned by the government in 1866.

These several propositions being true, our contention is neither the State of Kansas nor its citizens ever acquired riparian rights by reason of their ownership of land along the Arkansas river within the state boundaries.

This proposition may be deemed to be fairly well settled by the decisions of this tribunal. The court will take judicial notice of the situation and condition of the title of the government of its lands within the limits of both the western territories and the western states. While it may be true that the court would take no notice of any particular tract of land in controversy, save as it might be exhibited by the pleadings, we assume the court will permit us to discuss the question on the general basis of the government ownership of all the lands in the western states and territories prior to any grant by the government. Under this assumption we take it the present bill does not show that either Kansas or any of its citizens acquired any title to riparian lands along the Ar-

kansas river prior to 1866. If the rights of either Kansas or any of its citizens are to be protected and established by decree it is incumbent upon the complainant to show by its bill a title acquired prior to the congressional enactment, of which we shall speak, and the adoption of the policy which has prevailed in the arid western country.

The rights of settlers and miners on public lands in the Rocky mountains and westward has been the subject of a good deal of litigation, and their rights with respect to water, both by diversion and appropriation, are well settled by the adjudications of this court. It is the established doctrine, says Mr. Justice Miller in the Broder case, "that the rights of persons who have constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, are rights which the government had by its conduct recognized and encouraged, was bound to protect before the passage of the act of 1866." "We are of opinion that the section of the act which we have quoted was rather the voluntary recognition of the pre-existing right to possession, consisting in the claim of its continued use than the establishment of a new one."

The law to which that distinguished jurist referred is the act of 1866, now section 2339 of the Revised Statutes, and found in Vol. 14 U. S. Stat., page 252. Without quoting that statute literally or in its entirety, we may say it generally provides that whenever rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized by local customs or laws, the owners and possessors shall be maintained and protected in their rights.

This statute has been considered by this court many times and its scope and force is well settled by the decisions.

Atchison vs. Peterson, 20 Wallace, 507.

Basey vs. Gallagher, 20 Wallace, 670.

Jennison vs. Kirk, 98 U. S., 274.
Broder vs. Natoma Water Co., 101 U. S., 274.

The general doctrine evolved and stated by this court is that there was neither occasion nor necessity for the application of the common law regarding riparian ownership. The government was the owner of all the lands. It had the right to adopt whatever policy it saw fit; and this court has said by these decisions that the act of 1866 and subsequent enactments on the same subject disclose the policy of the government with respect to its lands and practically establishes the rule that riparian ownership does not prevail in the western country nor in any of those localities where the title was held by the general government. While this doctrine was announced in controversies over mining rights and claims of water therefor, it is equally applicable to water used for other purposes. In the Basey case the court expressly said: "There is no solid reason for upholding the right when the water is thus used (that is, in mining cases), which does not apply with the same force when the water is sought on these lands for any other equally beneficial purpose."

We take it, therefore, to be true that when the complainant alleges the conclusion of law that the State of Kansas and its citizens have riparian rights along the Arkansas river, and states no facts from which that right may be deduced, they are not entitled by virtue of that allegation to assert the existence of the rule either in Kansas or in Colorado. According to these decisions there is no such thing in the arid western country as riparian ownership or riparian law unless there has been some local or congressional legislation to that end. No local legislation is referred to. There is no congressional legislation providing for it, and the policy of the government is to the contrary, as exhibited by this statute and by these decisions. The policy is exhibited by many congressional enactments on kindred subjects.

Sec. 17, 16 U. S. Stat., 218, being Sec. 2340 Revised Statutes, enacts:

"All patents granted or pre-emptions or homesteads allowed shall be subject to any vested and acquired water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section."

This is particularly applicable, because, as disclosed by the bill, practically all the lands in Kansas claiming riparian rights were acquired subsequent to its passage.

In 1877 the congress first passed the Desert Land Act, which provided that a citizen, or a party who had declared his intention of becoming a citizen, might, on the payment of a fee of 25 cents per acre, file a declaration that he intended to reclaim a tract of desert land by conducting water on the same within a period of three years, and in recognition of the prior right of appropriators, the act provided "that the right the use of the water by the person so conducting the same on or to any tract of desert land of 640 acres shall depend upon *bona fide prior appropriation;* and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

U. S. Stats. at Large, Vol. 19, page 377.

In 1891 this act was made applicable to the State of Colorado, and the following provisions were added, amending and enlarging the same:

Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and also show the source of the water to be used for irrigation and reclamation.

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same at least three dollars per acre of the whole tract reclaimed.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto shall apply to and be in force in the State of Colorado.

Vol. 26, *U. S. Statutes at Large*, page 1096, *et seq.*

That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the secretary of the interior, with the approval of the president, be, and he is hereby authorized and empowered, upon proper application of the state, to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert lands in certain states and territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the state free of cost for survey or price such desert lands not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty acre-tract cultivated by actual settlers within ten years next after

the passage of this act, as thoroughly as is required of citizens who may enter under the said desert land law.

Vol. 28, *U. S. Statutes at Large,* page 422.

In 1888 the congress passed a joint resolution directed that the secretary of the interior by means of the director of the geological survey be, and he is hereby, directed to make an examination of that portion of the arid regions of the United States where agriculture is carried on by means of irrigation, as to the natural advantages for the storage of water for irrigating purposes with the practicability of constructing reservoirs, together with the capacity of the streams and the cost of construction and capacity of reservoirs and such other facts as bear on the question of the storage of water for irrigating purposes.

25 U. S. Stat. at Large, pages 618, 619.

In carrying out the above resolution the congress made an appropriation in the following language:

"For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of the sites of reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation * * * the sum of one hundred thousand dollars or so much as may be necessary."

25 U. S. Stats. at Large, page 526.

The act of August 18, 1894, in aid of the public land states in the reclamation of the public lands therein authorizes a patenting to such states of the amount that they shall cause to be reclaimed and settled free of cost, not exceeding one million acres in each of such states.

28 U. S. Stats. at Large, page 422, Sec. 4.

The act of January 21, 1895, empowers the secretary of the interior to permit the use of the right of way by canals and reservoirs through the public lands of the United States to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof.

25 U. S. Stats. at Large, page 635.

The act of January 13, 1897, provides for the establishment of reservoirs on the public lands of the United States by persons or live stock companies and the maintenance of the same so long as they are used for reservoir purposes.

29 U. S. Stats. at Large, page 484.

The act of February 26, 1897, provides "that all reservoir sites reserved, or to be reserved, shall be open to use and occupation under the right-of-way act of March third, eighteen hundred and ninety-one. And any state is hereby authorized to improve and ocupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the secretary of the interior may prescribe. Provided, That the charges for water coming in whole or in part from the reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective states and territories in which such reservoirs are in whole or part situate."

29 U. S. Stat. at Large, page 599.

This legislation exhibits and emphasizes the policy which the government has adopted and consistently carried out ever since the settlement of this western country, and the governmental policy so evidenced and established governs the whole range of the water subject. It not only provides for and protects the mining interests and gives the prospector and developer of mining claims the right to the water which has

been first appropriated, but provides for the carriage of water over and through land and all government property. And this right of way, defined and conferred by general enactment, will, as against subsequent purchasers, remain a perpetual easement and dominant estate. The same principle and the arguments by which it is supported are equally applicable and forcible when applied to the uses of agriculture or manufacture. When congress has thus spoken the declaration will be accepted. The courts will not interfere.

South Carolina vs. Georgia, 93 U. S., 23.
Wisconsin vs. Duluth, 96 U. S., 379.

The importance and the significance and the wisdom of this policy is very thoroughly demonstrated by a consideration of matters of which it may well be assumed this court will take judicial notice. And we urge it in answer to the allegations in the bill whereby the complainant attempts to establish or set up the value of the riparian rights which it is attempting to enforce. The great fertility of the lands along the river and the vast industries which have been built up along the stream, the numerous towns which have sprung into existence and the dependence of the state on the prosperity of these communities for its ultimate growth and its ultimate wealth. It may well admit of discussion whether these matters would ever be the subject of possible proof should the case come to issue, because no man can tell to what extent the waters will flow in the bed of the Arkansas river if not a drop is taken from its source by miners and agriculturalists in the Rocky mountain region. However this may be, the other side is more forcibly presented by the reports of the last census and that showing is enough to overcome the force and effect of these allegations in the bill of complaint. Four-tenths of the entire area of the United States, not in

cluding Alaska, depend upon irrigation for the prosecution of agricultural pursuits. The average value of these irrigated lands, according to this, is $83.28 per acre, making a total value in 1898 of land regarded as worthless but for irrigation, of nearly $296,000,000.00. The contention of Kansas, which would oppose and overturn the hitherto settled policy of the government, would endanger this vast interest and destroy the mining industries of the whole mountain region, and reduce to a desert waste every state and territory in the arid region. We think we may rightly make these suggestions in response to these immaterial allegations respecting the interests of the citizens of Kansas, whose rights and interests and damages are not definitely stated and who are not before the court complaining of their wrongs.

Since it has been demonstrated by congressional legislation and judicial decision that the common law of riparian ownership did not obtain in either Kansas or Colorado, where the government held title to all the land, it must follow that there can be no successful assertion of a modified or limited right of riparian use, if any there be, resulting from the date of settlement and acquisition of the government title without allegation fit and exact charging the dates of settlement in Kansas on specific lands and the dates of diversion and appropriation in Colorado by the state or by its citizens under state authority.

As we conceive it, therefore, no right accrued to settlers in Kansas by reason of the date of their settlement, as contradistinguished from the date of appropriation by Colorado or its citizens; because the settlement was on government land and in the territory embraced within the limits of the two states and in regard to which the law of riparian rights did not prevail at the time of the acquisition of the title thereto. But if it is insisted that by settlement or by user a right

might arise as against a subsequent appropriator in the other jurisdiction, there can be no recovery in the present suit on that hypothesis because there is no fit allegation charging dates and describing lands on which a decree might be predicated.

POINT III.

It is not Competent for one State to Interfere with the use of Water by the Neighboring Sovereignty, nor can that use be Controlled or Regulated by the Courts.

There is no debate possible as to this doctrine if it be considered only as it affects independent sovereignties or governments. In

Schooner Exchange vs. McFadden, 7 Cranch, 116 (136),

Chief Justice Marshall said:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

This is a fundamental principle of international law—the absolute independence of each sovereignty as against the other. The writers on this subject have given much consideration to the inquiry and to the development of the principles by which the rights of others to the streams, whether

navigable or otherwise, are to be measured. In the end the only possible conclusion is that the use within its own territory is only to be measured by the necessities of the particular government exercising the right.

The same principle controls and governs in the use of the waters of the streams within the limits of the states.

Each state may control the user save as that power is limited by our national legislation.

The state has the power to legislate as it may think best for the necessity of its own citizens without challenge, until in some way congress shall assert its superior power.

State vs. Miln, 11 Peters, 107 (138).

U. S. vs. Rio Grande Irr. Co., 174 U. S., 690.

Farm Investment Co. vs. Carpenter, 61 Pac., 258 (Wyoming).

In the case of New York vs. Miln, Mr. Justice Barbour states the rule as follows:

"That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated."

And in the case of the Rio Grande Irrigation Company, Mr. Justice Brewer expressly declares that as to every stream within its dominions, a state may change the common law

rule and permit the appropriation of the flowing waters to such purposes as it may deem wise. This right is limited by two conditions only, to wit:

"The rights of the United States as riparian owner, so far as may be necessary for the beneficial use of government property, may not be invaded, nor may its power to protect navigable streams be interfered with."

These limitations are not involved, nor do they in any way affect the present controversy since the general government can alone complain of their violation.

Colorado as a territory and a state has for more than forty years asserted its dominion over the waters of the natural streams within its boundaries. At the first session of the territorial legislature an act was passed providing:

"That all persons who claimed, owned or held a possessory right or title to any land or parcel of land within the boundary of Colorado territory as defined in the organic act of said territory and those claims are on the bank, margin or neighborhood of any stream of water or river shall be entitled to the use of said stream of water or river for the purposes of irrigation and making the said claims available to the full extent of the soil for agriculture."

Session Laws 1861, page 67.
Revised Stat. 1868, page 363, section 1.
Gen. Stat. 1883, pages 560-561, section 1711.
Sec. 2256 Mills' Ann. Stat., page 1361.
Secs. 5 and 6, Art. 15, Constitution.

It therefore follows that the acts charged against the State of Colorado and its citizens, being in conformity with and sanctioned by the laws of that state, can constitute no cause of action in favor of the State of Kansas or its citizens.

Were the rule otherwise, there could be no conceivable case in which either a state or its citizens might divert and appropriate water. There would after such use always be a diminution which would impair the right of riparian occupants in the adjoining state and the whole use of the stream and its tributaries for such purpose would be entirely cut off. The argument which would permit judicial control of the appropriation of water in one state at the suit of another state therefore goes too far when followed to its necessary results.

POINT IV.

Kansas Concluded by its own Legislation.

The State of Kansas is not in a position to protest against the practice of irrigation nor to assert that, judged by its own legislation and judicial decisions, the State of Colorado should be restrained in its encouragement of irrigation. As early as 1860, when the Platte and Arkansas rivers were entirely within the limits of Kansas, the territorial legislature created The Capitol Hydraulic Company and authorized it to divert, for irrigation purposes, all of the waters of the Platte river and Cherry creek.

No. Colo. Irrigation Co. vs. Platte Water Co., 12 Colo., 525.

The State of Kansas, in adopting the common law, did so with a qualification, which evidently was in contemplation, of the necessity of irrigation in at least the western part of the state.

"The common law, as modified by constitutional and statutory law, judicial decisions *and the condition and wants*

of the people, shall remain in force in aid of the general statutes of this state."

Compiled Laws of Kansas, 1885, section 6648, page 1018.

It would be impossible to find within that state a physical condition which more strenuously demands a variation from the common law rule to meet "the condition and wants of the people," than the necessity of irrigation for the reclamation of its arid lands. In line with this qualification, the legislature, in 1886, passed an act, providing in detail for the diversion and use of water for irrigation, in which this negative of the common law doctrine of riparian rights appears:

"The right to the use of running water flowing in a river or stream in this state, for the purposes of irrigation, may be acquired by appropriation. As between appropriators, the one first in time is first in right."

General Statutes, 1889, section 3516.

Again, in 1891, further provision was made by the legislature for the diversion of water, in which the following appears:

"In all that portion of the State of Kansas situated west of the ninty-ninth meridian, all natural waters, whether standing or running, and whether surface or subterranean, shall be devoted; first, to purposes of irrigation in aid of agriculture, subject to ordinary domestic uses, and; secondly, to other industrial purposes, and may be diverted from natural beds, basins or channels, for such purposes and uses, provided that no such diversion shall interfere with, diminish or divest any prior vested right of appropriation for the same or a higher purpose than that for which such diversion is sought to be made, without a due, legal condemnation of and compensation for the same."

Statutes of 1891, pages 223-260.

This last act also provided for the creation of irrigation districts, with the specific object of reclaiming so much of the arid land in the western part of the state as could be accomplished with the water supply in the running streams. In harmony with this legislative policy, the Supreme Court of Kansas has sustained the principle of irrigation in numerous cases, and particularly in

Campbell vs. Grimes, 64 Pac., 62.
Koen vs. Klein, 65 Pac., 684.

In the last case mentioned the following significant language is used:

"In view of the fact that the legislature of Kansas has in so many ways recognized the principle of irrigation and bestowed upon companies organized for that purpose so many rights, we can not hold that sections 1326 and 1327 take away from such companies all their characteristic rights as promoters of a public use."

Not only has the necessity of irrigation been recognized by the legislature and courts of Kansas, but it is a fact manifested on the ground and of which various government reports give full information, that many canals have been dug involving an investment of hundreds of thousands of dollars, without any protest upon the part of any one in Kansas, for the purposes of doing exactly what is being done by the like enterprises in Colorado.

POINT VI.

Laches.

Whatever may be the rule about laches when the suit concerns only the rights of sovereignties, yet when it seeks the remedies available to private suitors, the equitable rules

which govern in suits between private parties should control the action and would bar relief. There is no room in this case for the application of any other doctrine.

All of the various propositions which are suggested by the demurrer and argued in this brief necessarily compel somewhat of a repetitious statement of the allegations which are attacked by our demurrer. We take it that, as the bill now stands, we have a right to assume that the State of Kansas, as a state and as a sovereignty, has no right or interest in this litigation which it is entitled to call on this court to protect by the extraordinary process of injunction. Referring to the bill itself, we find that Kansas has no sufficient rights at stake or in jeopardy to call for the exercise of the court's prerogative in this direction. The state is suing only for the protection of its riparian rights. That is, it is only suing for these rights, and is only entitled to protection as to these rights, according to the extent of its proprietary interests as exhibited by the bill. These interests are measured by the value of the riparian right as to one hundred and twenty-seven acres of land. Not otherwise, nor to any extent, are the rights of Kansas injured or jeopardized. We take it that this is the law and we thus broadly state it. There are no such things as riparian rights except those which belong to the land which borders the river, and those advantages which belong to the adjacent soil are known by the name of riparian rights. Underflow gives no rights to the benefited land, unless, possibly, under circumstances which establish that the underflow is a fixed current moving along settled lines and of a continuous character. Whether this would give rights to the State of Kansas if it owned land of this kind, as contra-distinguished from riparian, is probably a debatable question. However this may be, we shall dismiss it from consideration because there is no statement in the

bill which shows that Kansas owns bottom lands which are watered by a continuous stream, in a regular channel, and with a continuous flow.

There may be herds which wander in the neighboring uplands and which must resort to the Arkansas river for the purposes of water. We are not advised that there is any law or any adjudication which would give to the owners of these uplands protection against the diversion of the waters of a stream, whether above or below the point at which the herds were accustomed to water.

We take it, then, under this condition of affairs, that under the well-settled principles of equity this court would refuse to entertain the bill for injunctive relief where the state's interests were of so little value and of such slight consequence. Of slight consequence in this, and particularly of little consequence when weighed against the apparent interests of the State of Colorado and of its citizens, as those rights are exhibited by the bill itself.

The doctrine of laches, as applied to riparian ownership, seems rather to come within the doctrine of prescription than of laches, as it is technically defined by the equity cases.

We are quite indifferent, however, to the point of view from which the question is examined. It has already been demonstrated in other sections of the brief that for more than forty years the State of Colorado has been asserting the right and upholding the policy of using the waters of the Arkansas river for the purposes of irrigation. It has likewise been demonstrated in another section of the brief that congress has, for more than forty years, been a consistent and constant protector of the policy of irrigation and the rights of miners and agriculturists in the mining and arid region, in the diversion and appropriation of water.

It is likewise apparent from the very terms of the bill that the people of these states have, during all that period,

been appropriating and diverting the waters of this river by the use of its tributaries and sources, whereby their rights have been settled and established. We take it the law would be, as against a private suitor, the delay in the enforcement or assertion of the claimed rights, would bar his recovery, or at least would bar his claim for injunctive relief. We are quite ready to concede that under the law of riparian rights the right to the use of the water is not a mere easement, but a property right, inseparably annexed to the soil, and that that right is not lost by non-user, nor does it depend for its continued existence upon riparian use. Notwithstanding this fact, this riparian right as to individual owners may unquestionably, under the law, be lost by what is usually termed, for want of a better term, acquiescence, which, by lapse of time, undoubtedly gives a prescriptive right. *Vide,*

Gould on Waters, Chap. 6.

It would be useless to cite the individual cases supporting this doctrine, because there seem to be none to the contrary. We therefore assume that it is true as against all the owners and settlers along the valley of the Arkansas within the limits of that state they would be barred to maintain the bill either on the equitable theory of laches, or on the other theory of acquiescence which has resulted in a prescription because of a presumed grant of the right of appropriation to the upper owners and proprietors. We think we have the right to insist upon the application of this rule and these principles to the decision of the present controversy, since it is apparent from the whole structure of the bill that it is filed on behalf of the citizens of Kansas, against whom, if they had brought the suit, as we think they must do if they would protect their individual rights, these contentions would be a complete answer and bar to any relief of the sort sought.

We are not at all certain that the doctrine of laches is not applicable as against Kansas itself. It is attempting, apparently, to assert a property right because of the ownership of some riparian lands, and wherever the sovereignty invokes the protection of the courts for such purposes it has been pretty generally held that it is bound and its suits controlled by the same principles which bind a private suitor, and control in a suit between two individuals brought for a similar purpose.

Cook et al. vs. U. S., 91 U. S., 389-398.

POINT VII.

Jurisdiction.

The bill is framed and the case so stated as to demonstrate that this court is without jurisdiction.

It would be a work of supererogation, and worse than useless, to attempt to cite and then analyze the various decisions of this court relating to its jurisdiction over controversies or in suits where states are parties. The question has many times been up and it would be difficult to conceive of a case which would present on its facts a phase of the question not already considered. In the very recent case of, *Missouri vs. Illinois*, 180 U. S., 208, the whole course and history of adjudication in this tribunal was carefully and exhaustively examined and the court's conclusion on its various phases broadly and lucidly stated. The contention of Colorado is directly to the point, that according to the structure of the bill and on the facts as they are now before the court, no case is made out by the State of Kansas against the State of Colorado.

There is an attempt in that direction, but we do not believe the court will entertain the suit because of that effort,

since it is clearly demonstrated that the case is wholly in that aspect of it an artificial one, conceived and produced for the express purpose and none other, to give this court a jurisdiction which will hold the bill and compel an answer in order that Kansas may, according to its main case, obtain a determination of the rights of Colorado and its citizens divert and appropriate the water as against the settlers and citizens of Kansas.

There is no statement of a cause of action against Colorado which entitles Kansas to be heard, even on the theory of riparian rights. We do not believe that the technical injury, if any, done to the very small bit of land which Kansas claims to own, will be regarded by this court as enough for the purpose of jurisdiction. It may be, as a general rule between private suitors, any right, though insignificant, if within the law, would give a court jurisdiction to entertain a bill and enter a decree. We do not believe that a court of equity, and this court particularly, in the exercise of its original jurisdiction, will entertain a bill on such slight grounds where the manifest purpose is to create a case of which this court has no jurisdiction. The whole question seems to have been clearly, fully and admirably settled in the New York and New Hampshire cases against Louisiana, wherein the court held that there was no principle of international law and no principle of law applicable to the states in their relations to each other which made it the duty of the state or conferred upon the state the right to enforce by suit claims of these states against the neighboring sovereignties in cases where the citizen himself could not maintain the action. It is very clearly established by the various authorities that the citizens of Kansas may not sue Colorado for its individual diversion of the waters of the Arkansas river, and it follows as a corollary under the case in 108 U. S., that Kansas may not maintain an action on behalf of its citizens and for their pro-

tection which the citizens themselves could neither bring nor maintain.

We deem it wholly unnecessary to consider the question whether the individual citizens and settlers of Kansas in the valley of the Arkansas river may or may not bring suit against the individual proprietors for the diversion of the waters of the river within the limits of Colorado. These parties are not before the court, and if any question affecting their rights is to be litigated or determined in this suit it is an indisputable proposition in equity practice that they must be brought in by proper averments and the rights of the one and the obligations of the other duly stated and relied on.

POINT VIII.

The Bill is Multifarious, and Defective in Parties.

While the only record parties to this proceeding are the State of Kansas and the State of Colorado, an examination of the bill shows that if any property rights possessed by these states are in real controversy, those rights are so trivial in the record of wrongs charged by the complainant that it may safely be said that for them alone the bill would never have been filed. The gravamen of the complaint is that scores of persons, firms and corporations have made appropriations and diversions of the waters of the Arkansas river along its course in the State of Colorado for their private advantage and for the development of their property interests; and that, as a result of this action, similar scores of persons, firms and corporations have suffered damage to their lands and other property interests riparian to the lower course of the same stream in the State of Kansas. So, too, it is charged that this Colorado diversion has likewise damaged the private property interests of various persons, firms and corporations, who

own large tracts of Kansas grazing land, not shown to be riparian in any legal sense.

Certain Kansas towns are also said to be deprived of some of the riparian privileges, which, it is said, should legally attach to them and to their inhabitants. And, in addition, it is alleged that the State of Kansas itself is to a very limited extent one of the Kansas riparian claimants, and that the State of Colorado itself is likewise one of the offending diverters of water.

Various details of consequential damage are pleaded, as, for instance, the loss of revenues to the State of Kansas on account of a decreased value of the Kansas lands in question, and the charge that certain lands in Kansas may become unfit for habitation, etc. These matters are not the cause of action, but the items of special damage resulting from the alleged infraction of severable and separate rights by severable and separate tort feasors. The gist of the whole matter, and the legal wrong complained of, is the assertion in Colorado of the right to appropriate water for beneficial uses, as against the claims of riparian owners in Kansas.

It is clear that the State of Kansas, as a state, and not as a mere owner of property rights, is attempting by this bill to procure an adjudication of the various private Kansas claims, as against the various private Colorado claims. The primary injury complained of is not that caused by the State of Colorado, as a state, but that caused by the appropriators of water in Colorado; and in this regard the State of Colorado is incidentally charged with being one of the actual appropriators of water within its own jurisdiction. So, too, the primary damage complained of is not that suffered by the State of Kansas, as a state, but that suffered by the individual riparian claimants in Kansas; and in this regard the State of Kansas is incidentally said to suffer likewise as an owner of specific lands.

On an avowed theory of the bill itself, some of the riparian claims may be legally subject to some of the claims by appropriation—for instance, as to one of its tracts of land held for a state institution, the State of Kansas claims priority over all Colorado appropriators who are subsequent to the date when the title held by Kansas passed from the federal government. As to the other tract, similarly held, it claims a similar priority, as against all appropriators subsequent to the date when that tract passed from the government.

The numerous Kansas claims are shown to have vested at various times during a long series of years; and so, too, with the Colorado claims. The private claims and claimants in Kansas and Colorado are not specifically disclosed; and though the cause of action and defense might be different in each case of conflict between these various private interests, the State of Kansas proposes by this bill, filed against another state, to conclude the interests of real defendants not parties to the cause, and of whose private rights the nominal defendant is no legal conservator. And so, too, the complainant proposes to do this on behalf of real complainants, to whose private rights the nominal complainant has no legal title, and to avenge the private wrong of whom the State of Kansas is likewise without legal capacity. Such a proceeding, we submit, is without any warrant in precedent and is against all principle.

According to the bill, each riparian claimant in Kansas has a separate claim against each appropriator in Colorado, or his claim may be against certain one or more of such appropriators. As to each of these claims, there may be separate defenses not common to the other conflicts. Again, each Kansas claimant has a claim against the State of Colorado on account of its separate diversion of water; and here, too, the defenses may be as different as the circumstances attending the claim. Again, the State of Kansas, as an owner of land,

has a claim against certain of the Colorado claimants, if not against the others. And so, too, the State of Kansas asserts its claims as an owner of land against the claims of the State of Colorado as an owner of a ditch and an appropriator of water. And, likewise, the non-riparian owners of grazing lands in Kansas have their separate claims against the separate Colorado appropriators of water, including the State of Colorado itself. In addition, the municipal authorities along that portion of the Arkansas river which lies in western Kansas may have their separate claims against one or more of the alleged wrong doers in Colorado.

All these conflicting interests mean a myriad of possible lawsuits, some cognizable in one forum and others in another. The defendant in one suit may not be at all interested in the case against the defendant in another suit; and a plaintiff in one suit may not be at all concerned in the outcome of the litigation instituted by another plaintiff. One man's defense can be of no avail to a defendant charged in another suit with the infraction of a different plaintiff's rights; nor can one litigant lawfully conclude the rights of a property owner not party to the record.

And yet, notwithstanding this fundamental law, the State of Kansas presents its bill for the very purpose of concluding the rights of persons not in the case at all; and, volunteering to prosecute in a wholesale way the separate Kansas claims, which the separate Kansas claimants may or may not desire to assert, the plaintiff asks that the State of Colorado be made a defendant in the same manner.

A theory of the complainant, as already expressed by its counsel upon the motion to file the bill, is that, while such appropriations of water as may have been made in Colorado during the time the Kansas lands were part of the public domain, may be superior to the riparian rights now attaching to such Kansas lands, yet these lands passed from the federal

government with riparian privileges, and that they are, therefore, freed from all dominant servitudes claimed by such of the Colorado appropriators whose rights attached subsequent to that time. The Kansas riparian lands are shown to have passed from the federal government in numerous tracts to numerous grantees at various times during a long series of years, coming down at least as late as 1889. And so, too, the Colorado rights are shown to have attached to various claimants during a long series of years, far antedating 1889, and extending back to the adoption of the Colorado Constitution in 1876, if not many years prior thereto. Even upon this theory of law, some of the Kansas claims set up in the bill are clearly subject to some of the Colorado rights, and no general relief could be granted covering the entire subject; nor could the relief prayed be decreed without denying valuable property rights to persons not in court.

For instance, the State of Kansas claims its rights from 1873 to 1889, charging that in or about 1890 the State of Colorado made a diversion of water, and also charging that this diversion, together with the numerous other Colorado diversions of various dates, including those earlier than the titles of the State of Kansas, unite in destroying the riparian privileges which should legally attach to the lands belonging to the State of Kansas. It is this similar union of early and recent priorities in Colorado that is said to injure the early and recent riparian lands in the State of Kansas in the same conglomerate way.

At places in the bill the inference is suggested that the State of Kansas desires the early Colorado rights shut off to supply early Kansas claims, and the recent Colorado rights shut off to supply recent Kansas claims. This is a legal proposition which, because of the laws of nature, simply means that all of the Colorado ditches, regardless of date, should be shut down so that all of the water of the river

may run to Kansas to satisfy all of the Kansas riparian lands, regardless of the origin of their particular claims and titles. And with this intent clearly in mind, the bill alleges that the Kansas lands in general now have "the right to the uninterrupted and unimpeded flow of all the waters of said river into and across the State of Kansas." (Page 21.) General relief is prayed accordingly, and the claim is made that the normal flow of the stream should be restored (Page 23).

In its prosecution of the grievances complained of, the State of Kansas asserts the general interest of all the Kansas riparian claims; and in asking that the State of Colorado, as an appropriator, be enjoined from diverting water, it demands that right for all of the Kansas lands and for all of their undisclosed owner and titles. Though as to each of these owners the State of Colorado may have a separate defense, all these matters are gathered together in one general complaint to be determined by a single decree, to bind the State of Colorado, if the complainant is successful, and to be of no binding force upon the separate riparian owners in Kansas if the defendant is successful.

The alleged wrongs are not charged solely to the diversion said to be practiced by the State of Colorado as an appropriator of water, and it is clear, from the bill, that this single diversion would be of no importance to the Kansas riparian claimants; and with this in view, the complainant proceeds in no uncertain way to attempt to shut down the ditches operated by the private Colorado owners. It is said that many of the Colorado ditches are owned and operated by corporations whose charters are limited in time; and, in order to cut off the rights of these corporations, and thus to attempt to destroy the early appropriations of water used by them, an injunction is asked restraining the State of Colorado from renewing the corporate life of such appro-

priators. These appropriations are all severable property interests, owned by private corporations, and the State of Colorado has no direct interest in them. But as they are said to embarrass the claims of Kansas and its citizens, they are all to be embarrassed in use and impaired in value, if not destroyed, in this indirect manner, without making their owners parties to the proceeding. In fact, the whole bill is filled with these allegations, which look to a deprivation of property rights without due process of law.

With all these conflicting interests and contentions merged into one bill, and sought to be litigated between these two nominal parties, we submit that the bill is multifarious to a vicious extent.

Most of the charges contained in the bill relate to matters of purely private right between the various Kansas and Colorado claimants. If every riparian claimant in Kansas sees fit to quit-claim his alleged right to some Colorado appropriator, or has estopped himself to deny the Colorado claims, or has by laches forfeited his rights as against any particular Colorado claimant, the State of Kansas could not complain; and its assertion of the depreciation of the taxable value of certain property in Kansas could be of no more avail to it than a similar depreciation in case a Kansas farmer saw fit to turn his improved farm into a dumping ground. The separate Kansas owners are not in court complaining, nor can their claims be thus prosecuted for them.

And so, upon the other hand, the separate rights of the Colorado appropriators have been independent of any grant to them by the State of Colorado. The private right of appropriation has always existed in that state; it was there expressly recognized by the federal courts long before the state was erected; the people of the territory recognized it in their Constitution when the state itself was established. The

right of appropriation is declared to exist in that document which creates the political entity against which this suit is brought, and the courts of the state have always recognized that the right to appropriate the waters of a naural stream was pre-existent of the state Constitution. Like other realty titles, the right to water by appropriation may be subjected in a measure to state control, but this court, in taking judicial notice of the Constitution and legislation of Colorado, must eliminate from the bill the allegations that the Colorado rights have been granted by the defendant.

Clearly, then, the State of Kansas is attempting to procure an adjudication of the claims of the riparian owners against the claims of the Colorado appropriators. Admittedly this is the purpose of the bill, and this purpose is made clear by the resolution of the legislature of the State of Kansas as set forth in the brief upon the motion for leave to file the bill itself, as also in the argument advanced in that brief; and for this purpose, the State of Colorado is made the sole defendant and charged with the alleged torts of its citizens, and the State of Kansas appears as the sole complainant. Thus the attempt is made to conclude the rights of thousands of persons in a proceeding in which the real defendants are not to be heard and the real plaintiffs are not to prosecute. No final decree can be entered herein without affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. This being the case, a long line of decisions of this court, from *Shields vs. Barrow,* 17 How., 130-141, to *Swan Land and Cattle Co. vs. Frank,* 148 U. S., 603-611, warrants us in saying that the bill should be dismissed upon demurrer.

If it can be said that there is any matter in the bill which is properly the subject of controversy between the State of

Kansas and the State of Colorado, as distinguished from the mass of matters touching private rights, this does not answer the point regarding the defect in parties, nor does it in any wise cure the fact that the bill is multifarious. If there be a controversy between the states, and that controversy be legitimately within the jurisdiction of this court, it is such an infinitesimal part of the matters charged that, regardless of that specific question, good pleading and practice and the ascertainment of the issues with singleness and certainty should require a reformation of the entire bill. In that manner, whatever issue exists between the states may be raised, and the jurisdiction tested, and the cause concluded without the embarrassment of a mass of matters sought to be dragged into the case, for which the State of Kansas can certainly ask no relief, and against which the State of Colorado should not be required to defend.

The allegation touching the property owned by the State of Kansas itself and that owned by the State of Colorado, is so relatively unimportant in the bill that little significance can be given to it. The complainant's counsel must know that the State of Colorado is not using, and never has used, the state ditch, and that no water has ever been diverted from it, and they charge the general damage suffered in Kansas to be the result of the general appropriations made in Colorado; but, testing the bill by demurrer, if this small severable claim were to be asserted at all, it falls directly within the ruling of this court:

"Indeed, the case as made in the bill would have stopped far short of the relief sought by the state, and its main purpose and design given up by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us."

Georgia vs. Stanton, 6 Wall., page 77.

POINT IX.

The Bill Does Not Invoke the Jurisdiction.

If it could be said that some court might entertain jurisdiction of some of the controversies exhibited by this bill, wherein lies the original jurisdiction of this court to do so? The federal jurisdiction under Article 3, section 2 of the Constitution contemplates controversies between states, between a state and citizens of another state, and between a state and foreign states and subjects. The eleventh amendment of the Constitution limits this grant of jurisdiction, by denying the right of a citizen of one state to sue another state in the courts of the United States.

It can not be contended that the jurisdiction of this court is here invoked in a controversy between a state and citizens of another state, for the sole parties to the record are the State of Kansas and the State of Colorado.

Under the guise of a controversy between states, the State of Kansas undertakes to prosecute the claims of her private citizens against the claims of private citizens in the State of Colorado. These private claimants could not invoke the original jurisdiction of this court for the purpose of settling their controversies; and there is no authority of law by which a state can do it for them, even though such litigation could properly be carried on without these claimants being parties to the record. Whatever private right may be at issue is a matter for the determination of some other tribunal. This court has not looked kindly upon any attempt to enlarge its jurisdiction by construction; and the logic that prevents a state from suing another state on behalf of some complaining citizen is even more forcible in preventing a state from suing the citizens of another state on behalf of some similar citizen; for in the latter case the complaining citizen has his proper

forum, and in the former he may go entirely without relief under the federal compact. The theory upon which a large part of the matter injected into the bill was pleaded must therefore fall.

The complainant, by its original brief upon the motion to file, seemed to take the position that the riparian claimants have no forum, and that, therefore, the state has sovereign capacity to sue to protect the rights which its citizens can not protect. A state, however, has no such sovereign capacity as will permit it to prosecute the private claims of its citizens and to make those claims its own; and the private Kansas claimants have another forum within which to raise any question at issue between them and citizens of other states. So, too, the rights which the State of Kansas desires to assert for itself against private parties in Colorado are not controversies between states; and, if within the jurisdiction of this court, could only be presented in a bill making these private parties record defendants.

In the same manner, the complainant attempts to invoke the jurisdiction of this court by lending its name to the prosecution of the private claims of its citizens against the State of Colorado as a state. This could not be tolerated; nor could the jurisdiction be thus invoked, even though this particular class of claims were presented in a separate bill, and the legal title to the claims thus vested in the State of Kansas for the purposes of the litigation.

The complainant's position is that, as to these claims, the state has sovereign capacity to prosecute, for otherwise, the claims of its private citizens could not be enforced. (Brief, page 14.) It is entirely unnecessary, however, to consider this argument, for it has long since been repudiated by this court. Whatever the effect of the action on the part of the State of Colorado may be as to damaging the private

rights of an individual Kansas claimant, and whatever the belief of the complainant may be as to the power which ought to exist, the letter and the spirit of the Constitution prohibit this court from entertaining a suit predicated upon such a contention.

New Hampshire vs. Louisiana, 108 U. S., 76-91.

The complaint is made that the citizens of Colorado are acting unlawfully in their appropriation of the waters of the Arkansas, and this unlawful action is charged to the State of Colorado; and, as this action is said to result in general damage to the people of the State of Kansas, it is claimed that the entire matter is cognizable in an action between the states. That the action of these private Coloradoans is not the action of the State of Colorado seems too clear for argument, and any right to maintain the bill on this score seems concluded by the direct holding in *Louisiana vs. Texas,* 176 U. S., 1-16, that, in order to maintain jurisdiction, it must appear that the controversy to be determined is a controversy arising directly between the states, and not a controversy in vindication of the rights of particular individuals. As was said in that case, the mere fact that the matters complained of affect the citizens at large of the complaining state (page 19) does not call for the exercise of the original jurisdiction of this court, if the case stated is not one presenting a conflict between the states.

It is clear that the injury inflicted is not suffered in common by all the people of the State of Kansas. In the case of *Louisiana vs. Texas,* the complaint was that the city of New Orleans suffered in particular. Here, the charge is that the direct injury is borne by those riparian owners who reside in that portion of western Kansas, and on that portion of the Arkansas river where, as is generally known, irrigation

is an essential to successful agriculture. And, as was said by Mr. Justice Brown in his concurring opinion in that case (page 78), the controversy does not affect the entire state, and the state is not the proper party complainant. The truth is that in the case at bar, as in the case last cited, the complaining state is presenting itself in the attitude of *"parens patriae,* trustee, guardian and representative" of the owners of riparian lands on a portion of one of the streams entering the state.

In its struggle to make the cause its own for the purposes of jurisdiction, the complainant goes so far to allege a depreciation of taxable values and a consequent loss of revenue to the state itself, and that, therefore, all of the citizens of Kansas are interested in the controversy. This is carrying the claim of jurisdiction to the limit of things. It might as well be said that if Colorado places some particularly favorable inducement upon the mining of coal or of gold, or decrees an immunity from taxation upon the farming of certain crops, and thereby induces an emigration from western Kansas with the result of depopulating a western Kansas county and reducing its taxable value for state purposes, that a controversy would exist between the states. The State of Kansas can pass what assessment laws it pleases. Its citizens can, within certain known limits, do what they please with their property, and the consequent change in the taxable value is of no enforceable legal importance to the state. For, while the state may be the political agent of its citizens, it is not their guardian nor their financial master. A mere incident of this character may be somewhat important as a consequence, but it has no legal value in this proceeding. In a similar and unavailing manner the state of Louisiana, in its alleged controversy with the state of Texas, charged a reduction of its taxable property, a retardation of immigration, etc. (supra, page 9).

The mere fact that states are named as parties does not conclude the question of jurisdiction (*Wis. vs. Pelican Ins. Co.*, 127 U. S., 265-287), though the theory of complainant's bill seems to be that the jurisdiction in cases of this sort rests entirely upon the character of the parties. As this court has said in *Missouri vs. Illinois et al.*, 180 U. S., 208-240, the general language employed in *Cohens vs. Virginia*, 6 Wheat., 264-392, looking to a recognition of so broad a statement, has been modified by later decisions. Whether the rule as now declared by this court is one going to the jurisdiction of the court, or to the want of equity in the bill, it is clear that the jurisdiction will not be exercised where an inspection of the bill shows that its purpose is to raise a question beyond the interest of the state.

It is to be noted that some suggestion is made in the bill to the effect that the alleged torts practiced in Colorado have, or will have, some injurious effect upon the health of the population of Kansas. This is clearly a mere make-weight to aid in the attempt at invoking jurisdiction; and the allegations in this regard were evidently inserted so that some analogy might possibly be drawn between this case and that of *Missouri vs. Illinois et al.*

It can be seen at a glance that the bill does not charge anything affecting the general health of the people of the State of Kansas, nor any serious consequence in this regard to any of the people of any portion of that state. In view of the fact that the arid part of the West is universally known for the healthfulness of its climate, it could not safely be alleged that the complaining state could properly act in this case in protection of the health of the state; and so the allegations proceed upon the theory that if the water is not allowed to run to Kansas, the riparian lands are of little value, and that, as nothing can be raised upon them, they

are, or will be, uninhabitable; and it is therefore suggested that the "salubrity" of the climate of a part of the state may be affected. This is all a begging of the question, and is almost trifling. The complaining state would be no more within the jurisdiction of this court upon that score than if it alleged that a zinc smelter had been constructed in another state and within a few rods of the state line, and that the land immediately surrounding was thus made uninhabitable by the fumes, and that, therefore, the health of the people of the complaining state was affected.

The case of *Missouri vs. Illinois* adds no weight to the complainant's case. There the operation of the canal was charged as being unlawful on account of the consequences, which were pleaded in such a way as to show a probable and dangerous effect upon the health of the body of the population of the complaining state under circumstances in which the private property owners were without relief. Here the alleged danger is special and specious, and not at all affecting the merits of the case. The act of appropriating water is the wrong complained of. On the theory of the bill itself, if the riparian lands in Kansas are subject to a dominant Colorado user of water, all the consequences set up are of no avail; and admittedly, if the Coloradoans are in the wrong, the alleged dangers will correct themselves. The State of Kansas does not seek to benefit the health of the state. Its primary object is to obtain the water in controversy. The state is in the position of a litigant who says that the property in controversy belongs to him, and that his health is injured by the defendant's keeping possession of it. The question at issue is the title to the property itself, and the jurisdiction is not to be determined by an allegation of a particular consequence, if the act itself is legal. The question at legal issue is the one on which the jurisdiction must be tested.

Seemingly to raise another analogy with the case of *Missouri vs. Illinois*, the bill charges the acts of the numerous Colorado appropriators as being chargeable to the State of Colorado itself. It is to be noted that in the case cited, the complaining state joined as a defendant The Sanitary District of Chicago, the builder of the canal, and showed that it was the direct agent of the state. Here the judicial notice of the court will require it to say that the unnamed Colorado appropriators are not acting for the state, and that their acts are in no manner the acts of the state itself.

The Bill Attempts to Control Political Action.

We go further. The bill attacks the rights of the State of Colorado in its political and sovereign character, and seeks to direct the action of that state. To this end, the State of Kansas asks this court to enjoin upon the State of Colorado the policy which Kansas, for the purposes of this suit, believes should be enforced by Colorado upon the citizens of that state. The State of Colorado has a perfect right to declare the policy it shall adopt in relation to the unnavigable waters of the state (*United States vs. Rio Grande Co.*, 174 U. S., 690), and it has said that, so far as it is concerned, the people of the state shall have the right to use those waters. All the legislation that the legislature of the State of Colorado could enact would not, in itself, deprive riparian claimants in Kansas of the water. The wrong, if at all, is accomplished by the ditch builders; and as to them, the State of Colorado says that, so far as it is concerned, they may exercise the rights they have always exercised, just as the federal congress has said the same thing in all of its legislation upon the subject. Nevertheless, the State of Kansas asks this

court to say to the State of Colorado that its political action is not sovereign within its own bounds; that it must decline to give its consent to the appropriation of water by its citizens; that it must not enforce the policy regarding unnavigable streams which this court has said it may enforce; that, though the legislation of the state has for years provided for the extension of the corporate life of ditch companies, this must be stopped; and that hereafter the State of Colorado shall not in any wise extend its consent to the carrying on of the practice of irrigation.

The practical effect of it all is to deprive the State of Colorado of some of its functions of statehood, and to control its political action. This court has suggested that in some of the cases touching the original jurisdiction, it is difficult to say whether the bill should be dismissed as being without the jurisdiction, or as being without equity; but the court has uniformly declined to exercise its jurisdiction when the relief sought is such an interference with the political sovereignty of a state.

Whatever the policy of the State of Colorado or its political action may be, the legality of the particular diversion practiced by a particular citizen, as against the claims of any particular Kansas riparian owner, may still be a matter of dispute between the parties; but the state itself has never surrendered its right to make laws for its own citizens, or to adopt such policy of internal development as it may choose, or as may be necessary for the upbuilding of the state; nor can this court impress upon it any such necessity. Calling for judgment upon a political question, the complaining state can not bring itself within the jurisdiction by alleging some particular trespass upon its property

rights, such averment not being the substantive ground of the relief sought.

Cherokee Nation vs. Georgia, 5 Peters, 1.
Georgia vs. Stanton, 6 Wall., 74.

POINT X.

The Bill is an Attack upon the Policy of the Federal Government.

Again, the effect of the bill, if maintainable, would be to nullify the acts of congress, to declare void titles which have vested under those acts, to prevent the development of the arid lands in the public domain, and to negative the entire policy of the federal government, which for years has been developed with great care and at great expense.

By act approved July 26, 1866 (14 Stat. at Large, p. 253), congress specifically recognized the doctrine of priority by appropriation, in the arid region, and decreed that the rights vested under this doctrine should be protected. This was confirmed by later legislation, and by act approved June 10, 1872 (17 Stat., p. 390), an early act applicable to the territory of Montana was made applicable to all of the territories so as to permit their legislatures to incorporate irrigating ditch companies, etc., congress at the same time making the legislation retroactive, and by its language recognizing the legality of the work. The Constitution of Colorado, adopted in 1876, and containing the provisions to which the complainant objects, was likewise accepted by a proclamation of the president, August 1, 1876, and the state of Colorado declared to have complied with the enabling act.

By the act of March 3, 1891 (26 Stat., 1095), and the act of May 11, 1898 (public, No. 88), congress took further steps to see that the arid region was developed, by providing

easy means of procuring a confirmation of the right of way for all proposed ditches which crossed public land, and by subjecting the public domain to selections for reservoir sites, whether the water was used on the public land or not.

Recognizing the necessity for local action, congress, by the eighteenth section of the act of 1891, specifically declared that "the privileges herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states and territories;" and the department of the interior, in order to facilitate the purpose of the government, has issued frequent bulletins and instructions to further the work.

To enforce the same policy, which means, among other things, an increase of values in the public domain, congress, by the act of 1891 (26 Stat., 1096), specifically provided that patents should not issue in a particular character of entries unless the applicant showed the expenditure of a certain sum of money in irrigation works, and proved the actual steps necessary to the beneficial irrigation of the land. Still later, by act approved August 18, 1894 (28 Stat., p. 422), for the avowed purpose of aiding in the reclamation of the desert lands in small tracts by actual settlers, and to induce the public land states to assist in the government work, the secretary of the interior, with the approval of the president, was authorized to contract with the states and to bind the United States to patent lands to these particular states free of charge, and thus to convey such lands as the states may cause to be irrigated and reclaimed "as thoroughly as is required of citizens who may enter under said desert land law." Thereafter the state of Colorado, in 1895 (Session Laws, 1895, p. 157), accepted the provisions of this act and the grant of land therein mentioned.

It would be easy to call attention to the policy and legislation of the government in more detail, but this is enough to

illustrate the undeniable fact. The work can not be carried on without doing the very thing which the State of Kansas says must cease. In the face of all this, the complaining state says that the work shall stop; that Colorado shall make no appropriations of water; that it shall not enforce this legislation; that it shall not reclaim the lands, and that, although the government recognizes private corporations as necessary in carrying out the work of irrigation, and likewise recognizes the aid of the state as essential in prosecuting the labor, yet the State of Colorado shall keep its hands off, and do nothing to aid the government, and that the acts of congress shall thereby become futile. Regardless of any question of parties, and regardless of any proprietary interest possessed by the State of Kansas, this court will not lend its aid to the complainant in a case which would have this effect.

Wis. vs. Duluth, 96 U. S., 379-387.

Mississippi vs. Johnson, 4 Wall., 475-500.

POINT XI.

The Law of Appropriation is General in the Arid West, and the State of Kansas, Itself, Has Recognized and Established the Right to Appropriate the Waters in Controversy.

Coming to the main question in dispute—the rights of appropriators as against riparian owners—one theory of the State of Kansas, as expressed in its original brief upon the motion, seems to be that though such appropriations as were made in Colorado before Kansas owners took title are good as against those owners, yet all subsequent appropriations are illegal as against the same adverse claimants. This, in itself, must eliminate all claims urged by Kansas for itself or its citizens as against such appropriations as existed prior to the acquisition of title from the federal government by par-

ticular Kansas grantees. The bill itself charges that ever since the adoption of the Colorado Constitution such appropriations have taken place; and the title to the Kansas lands is alleged to have passed from the government at various dates, many of them of comparatively recent time.

It is alleged, however (page 9), in the bill that the right of the defendant to the State Canal of Colorado attached in 1890, and that the riparian rights of the State of Kansas attached not later than 1889; and the contention is made that Kansas is therefore prior in this regard. It is also to be noted that no title vesting in the State of Kansas is alleged to antedate 1873. So, too, it is to be noted that all, or practically all, of the Kansas lands for which complaint is made lie west of the 99th principal meridian; and it is, in addition, to be remarked that, regardless of this theory of special rights dating from the acquisition of title, the bill, in a broadside manner, claims that all the water of the river should be allowed to flow to Kansas for the satisfaction of all the riparian claims, regardless of their dates, and regardless of the dates of the Colorado appropriations. To this intent the entire theory of the appropriation of water, as practiced in Colorado, is attacked.

The question therefore arises: What is the law of water in this section of the United States as to appropriation and riparian user? The claim of Kansas is that the strict common law doctrine of riparian rights prevails for the purposes of decision in this case; and that whatever change has been made in Colorado is *sui generis,* and of no binding force so far as concerns the Kansas lands. Upon the contrary, we submit that this strict common law rule never did prevail in the territory in question, and that the rule alleged to be peculiar to Colorado is the law in this portion of the arid West in general, and has always been so recognized. It is the law not only in Colorado, but also in western Kansas.

Even though it could be said that neither state had the right to change the common law doctrine in this regard, and that no person has or had a right to appropriate any of the waters of the Arkansas river for purposes of irrigation, we contend that the State of Kansas, by its legislation and practice, has put itself in a position where it appears beyond question that the object of this bill is a mere subterfuge; and that, if the relief sought could be granted, the purpose for which the suit is professedly instituted would never be satisfied, but upon the contrary, the waters in question would immediately be put to the uses which the complainant charges as unlawful. In other words, the State of Kansas asks this court to give it water to satisfy its riparian lands, when in truth and in fact, if it received the water, it could not and would not be used for riparian purposes. In this view of the case, we submit that no court of equity would lend its aid, and that the court should say to the complainant that it will not undertake to investigate a mere moot proposition of law, when it appears that the complainant within its own jurisdiction could not and does not enforce the rule for which it contends.

Even at common law, a reasonable use of the water was allowed for irrigation; but the physical conditions attending the formation of the common law were such that the riparian use was the essential value of water, and the rule formed itself accordingly. If the common law had originated in an arid country, dependent upon the irrigation of lands for the maintenance of the people, the reason that underlies the common law rule would, we may presume, have changed the rule accordingly. In the arid West, where such changed conditions exist, the adoption of the common law has been with such modifications as are necessarily incident to the development of the country. A strict common law riparian user would mean the stultification of the object of the law itself,

for no mills could be built where no grain could be grown, and no riparian user could be practiced where the land could not be made to support life.

The doctrine of which Kansas complains in this bill is and has been the law of Arizona, Colorado, Idaho, New Mexico, Nevada, Wyoming and Utah, and of all that part of Kansas which is in question. So, too, so far as the conditions have demanded, it is the law of other states which are in part arid. Either with or without the aid of statutory expression, these states have declared that the common law rule of riparian rights has been abandoned or has never existed within their arid regions.

Arizona:

Clough vs. Wing, 17 Pac., 453; *Oury vs. Goodwin,* 26 Pac., 376; *Austin vs. Chandler,* 42 Pac., 483.

Colorado:

Oppenlander vs. Left Hand Ditch Co., 18 Colo., 142.

Idaho:

Drake vs. Earhart, 2 Idaho, 716.

New Mexico:

Frambley vs. Luterman, 6 N. M., 15; *Millheiser vs. Long,* 61 Pac., 111.

Utah:

Stowell vs. Johnson, 7 Utah, 215.

Wyoming:

Moyer vs. Preston, 44 Pac., 845; *Farm Co. vs. Carpenter,* 61 Pac., 259.

Nevada:

Bliss vs. Grayson, 56 Pac., 231.

In Colorado the first territorial legislature (1861) recognized the right to appropriate water by providing statutory aids thereto, and in the first case touching the question (*Yunker vs. Nichols,* 1 Colo., 551-553), it was said that, while "the principles of the decalogue may be applied to the conduct of men in every country and clime, the rules respecting the tenure of property must yield to the physical laws of nature whenever such laws exert a controlling influence. In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels in order to obtain the fruits of the soil, and this necessity is so universally imperious that it claims recognition of the law."

This is the theory of the whole matter, and underlies the law on this score in all of the arid states; and, as this court has frequently said, congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. As was held in the most recent case in this court, every state has the power within its dominion to change the rule of the common law and permit the appropriation of the flowing waters for such purposes as it deems wise.

U. S. vs. Rio Grande Damming and Irrigation Co., 174 U. S., 690.

No mere grant of power from the State of Colorado vests the right in its citizens. The Constitution of the state was

merely a recognition of the pre-existing natural right, just as this court has said (*Broder vs. Water Co.*, 101 U. S., 274), that the first federal legislation upon the subject was merely declaratory of a pre-existing right. The state itself, as an appropriator of water, stands with its citizens upon the theory that he who is first in time is first in right; and the pre-constitutional rights in Colorado are given all protection, the Constitution itself declaring the inapplicability of the common law rule in that state.

The land west of the 99th meridian is known to be arid and of little use without the artificial application of water, and upon this subject the common law has never been enforced in this section of the country. Part of the land came from Mexico, and there the user of water for irrigation at the expense of a naked riparian claim is and has always been legally permitted. Part of the land came from France, where the common law had no application at all. During the years that parts of the territory belonged to Texas or to Missouri, such portions were practically uninhabited, and such habitation as there was required the use of water in a manner inconsistent with the common law.

When a form of government impressed itself in a practical way upon the region in question, through the organization of Kansas as a territory, and later through the organization of the territory of Colorado, the State of Kansas and the State of Colorado, a distinct repudiation of the common law doctrine was at once enforced and continued not only by Colorado, but also by Kansas.

In February, 1860, long before any of the Kansas titles asserted in the bill attached, the territory of Kansas put itself upon record by passing an act authorizing the construction of a ditch and the appropriation of the waters of the Platte river, near Denver, then in the territory of Kansas,

but at a point now in the State of Colorado, and permitting the Capitol Hydraulic Company to divert the waters of two streams for the irrigation of lands lying beyond their watershed. This act was thereafter expressly approved by the legislature of the territory of Colorado. (*G. Laws* 1867, page 105. See *Northern Colo. Irrig. Co. vs. Platte Water Co.,* 12 Colo., 525.) The latter territory pursued the same theory, and in adopting the common law did so only "so far as the same is applicable and of a general nature."

2 Mills' Ann. Statutes, Colorado, Sec. 4184.

This same modification of the common law has been recognized in the arid portion of all the political sovereignties from which the State of Colorado was created, and is further evidenced by the action of Texas, which has also declared that in those portions of the state where the aridity of the climate makes the irrigation of lands a beneficial use the waters of the natural streams are subject to appropriation, and for this purpose are the property of the public.

Rev. Stats. of Texas, 1895, page 608.

When the State of Kansas came to express itself upon the subject, it at an early day, and long before the inception of any of the titles held by the complaining state, declared the common law to be the rule of action in that state, but only so far as modified *"by the conditions and wants of the people."*

Gen. Stats. of Kansas, 1868, Sec. 3, chapter 119.

This act was merely declaratory of the law as it was theretofore understood to exist in that part of Kansas; and the fact is that prior to its approval the governor of that state, on February 29, 1868, had approved another statute giving to corporations the right to construct irrigating canals,

furnish water for irrigation, etc. (*Gen. Stats. of Kansas,* 1868, page 214, Sec. 89.) This action, of course, presumed the existence of the right to use water other than in accord with the strict rule of the common law, and merely conferred upon corporations the right which individuals already possessed.

In 1891 (*Gen. Stats. of Kansas,* 1897, page 713, Sec. 102), the rule of law now complained of by Kansas was further emphasized by its legislature by giving the right of condemnation for irrigation improvements, and specifically providing that no person should construct a canal so as to injure any prior canal "or to diminish the supply of water flowing to or through any established irrigating canal." This is absolutely nothing but the doctrine of priority by appropriation, which, under the guise of this suit, the State of Kansas is attempting to assert for its citizens, and deny to the citizens of Colorado.

If anything further were needed to show that the common law doctrine did not and does not prevail in the territory in question, it is to be found in the legislation enacted by Kansas in 1886 (chapter 115, Laws of 1886), expressly declaring that the waters of a running stream may be acquired by appropriation, the first in time being the first in right. Again, the act of 1895 (chapter 162) provides for the development by irrigation of the lands of the state west of the ninety-eighth meridian, and a complete code upon the entire subject, enacted as chapter 113 of the statutes of 1891, provides for the consuming use of waters by irrigation, etc., west of the ninety-ninth meridian, subject to prior vested appropriations. This absolutely ignores all contentions as to the existence of common law riparian rights. The act devotes all the natural waters in the state west of the ninety-ninth meridian, whether standing, running, surface or underflow waters, to irrigation, etc. It follows in large measure the police regulations upon the subject which the Colorado legislature had found applicable.

At this point, therefore, we protest that the complainant is without the pale of equity. If it could succeed in its suit and close every ditch in Colorado, the avowed purpose of the suit would go for nothing, for it is apparent that that purpose is a mere subterfuge. The fact is that Kansas desires to compel the flow of water to it upon riparian grounds; and the moment the water reaches Kansas it is to be subject to appropriation in exactly the same way which Kansas here declares to be illegal. No riparian right in Kansas would be recognized as against the right to appropriate water in that state; and the state itself could not assert its alleged riparian claims as against any of its citizens who desired to appropriate the waters; and all of the allegations of consequential damage which are pleaded in the bill would go for nothing. A Colorado ditch owner, after his ditch was closed by the judgment of this court, could abandon his early priority and move across the line to Kansas and appropriate the water anew, as of a recent date, and the complainant could not dispute his right. The effect of it all is very clear; and we say advisedly that the complainant does not come into court with clean hands, and that, upon the contrary, the status of the law as it now exists shows that upon the case as stated the complainant is entitled to no relief.

In the recent case of *Campbell et al. vs. Grimes,* 64 Pac., page 62, decided on March 9, 1901, the Supreme Court of Kansas restrained a diversion of water at the instance of a lower riparian owner, but did it upon the distinct ground that the upper claimant was not applying the water to any beneficial use. The right of the upper claimant to the exclusive use of such water as was actually needed for irrigation was conceded; but the court held that if any doubt existed at common law of the right of an upper riparian owner to appropriate all the water flowing through his land, "whether necessary to his reasonable purposes or not," there

can be no doubt now that he has no right as against a lower proprietor to appropriate any more of the stream "than is needed for his own beneficial uses." The contention in that case must have gone far, for it was evidently urged that at common law a riparian owner has the right to divert and waste all of the water; but the ruling of the court was put upon the clear ground that no waste could be permitted, and the authorities relied upon by the court are those upon which the whole law of priority by appropriation to beneficial uses, to the exclusion of the common law riparian claims, depends.

POINT XII.

The Bill Attacks the Sovereignty of a State.

Let us approach the matter from another standpoint, and see to what extent the State of Kansas can complain.

The state does not charge any action which interferes with the navigability of the Arkansas river. Upon the contrary, it specifically alleges that the river is not navigable in fact at any point above Fort Gibson, Oklahoma. There is a statement in the bill (page 2) that the river, upon leaving the Rocky mountains, is a navigable stream under the rules and departmental regulations of the United States. Whatever the extent to which judicial notice extends, any notice taken judicially of the geography of the country must eliminate this charge. In addition, any complaint on that score must come from the federal government, and not from the complainant in this case.

A stream is only treated as a public navigable stream when it is navigable in fact (*The Montello,* 20 Wall., 430-439), and as the complainant does not charge any interference with navigation, and no complaint is made by the federal gov-

ernment or by any state or territory in which the stream may be navigable, all questions of interference with navigation can be excluded from the argument. We have, then, a case of the appropriation of the waters of an unnavigable stream by a state, and by the citizens of that state acting with the state's consent and approval. Can such action be attacked by another state? To this question we think the court must give a negative answer.

The Arkansas river in the territory in question was once the boundary between the United States and Mexico, as the Rio Grande is to-day. In 1895 the Mexican minister to this country complained that, although the city of El Paso del Norte had for about three hundred years enjoyed the use of the waters of the Rio Grande for irrigation, yet quite recently ditches for similar purposes had been constructed in Colorado and New Mexico, with the effect of diminishing the water supply at El Paso del Norte, thus reducing the price of lands, and otherwise causing damage. The claims of the injured parties were asserted for them by the Republic of Mexico, and, consequent upon a resolution of congress, the matter was submitted by the secretary of state to the attorney general of the United States for his opinion as to the legal merits of the claim. That officer rendered an opinion which may be found at page 274 of volume 21, "Opinions of the Attorney General."

As in the case at bar, the question arose as to which country should yield to the other in a case of the necessary user of the waters of an unnavigable stream. The opinion referred to collates the authorities upon international law to the effect that whatever servitudes may exist between nations regarding such water courses, they go no further than to prevent the lower country from backing up the water to overflow the upper country, or to prevent the upper country

from throwing the stream upon the territory of the other at a new place. The conclusion of the attorney general was that the appropriation of water is, if anything, a lessening of such servitude cognizable between nations; and that a contention denying the right of appropriation would in reality make the lower country dominant, and subject the upper country to the burden of arresting its own development and denying its inhabitants the use of a provision which nature has supplied within their own territory.

This argument we consider of value; and in line with it, we say that the contention of Kansas would arrest the development of the public domain in Colorado, and infringe upon the rights of that state to do as it sees fit with the waters with which nature has endowed it.

The bill directly attacks the right of the State of Colorado to take its own waters for its own purposes, and demands that that state leave the waters flow, so that they can be used by the State of Kansas for its own purposes. If there be any question at issue between the states, it is this question, which is based on the conflict between the lands used by the State of Kansas for public purposes, and the ditch and reservoirs built by the State of Colorado for its own purposes.

If a state has any sovereignty, it must be said to be entitled to make such disposition as it sees fit of waters in its unnavigable streams, as well as to decree the character of ownership in any other real estate within its territory. Whatever might be the result in case of interference with the property interests belonging to the federal government, or with the functions of that government, where this element is not involved, no one can complain. Certainly another state has no legal ground of complaint. While the states are not nations, their rights in this regard must be held to be simi-

larly exclusive. Otherwise, the parity of statehood under the federal compact could not be maintained.

This has been recognized by this court in the case of *U. S. vs. Rio Grande Irrigation Co.*, 174 U. S., 690, to be true in the disposition of waters for irrigation and other beneficial purposes. In that case it was distinctly held that, while the common law doctrine of riparian rights obtains in those states "which have simply adopted the common law," yet "as to every stream within its dominion, a state may change the common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." (Pages 702, 703.) If this be true, how, under the circumstances of this case, can this court give Kansas the relief prayed without requiring the State of Colorado to deny the benefit of the rule which this court says that state may adopt; and how can the State of Kansas say that the State of Colorado may not construct its ditch and divert the waters of the river? If a riparian owner in eastern Kansas were to deny the right of appropriation in the western part of that state, he could not succeed under the laws of his own state. If the State of Kansas itself were to urge its riparian claims against an appropriator in western Kansas, its own statutes would defeat it. And for still stronger reasons, it must be defeated in urging a claim which denies the right of the State of Colorado to act as it sees fit in the premises.

Recognizing the superiority of the federal government, a state must, of course, act within the limits needed to protect that government; and this court has recognized those limits by holding that the state must not destroy the right of the United States as a riparian claimant without specific authority, and that it must not interrupt the navigability of streams. (*Rio Grande Case, supra,* page 70.) In the case at bar, the latter question is not involved and the federal gov-

ernment is not complaining; and as to the riparian rights of the United States, as was said in the case last cited, as a result of a long line of federal decisions, the government has expressly given its consent, subject to the condition that navigation be not interfered with. Even if a slight intereference with navigation resulted, this is within the province of the state in the exercise of its right to legislate for the interest of its own people, and not subject to challenge until the federal government asserts its superior power.

U. S. vs. Rio Grande Company, supra, page 703.

If the State of Kansas asserted its riparian claims against individuals who are appropriating water in Colorado, a similar answer would have to be given to it, for the titles to these individual rights are not subject to the laws of Kansas, and are entitled to the protection of those Colorado laws which this court says may properly be enacted. And this same answer would have to be given, even though Colorado saw fit to maintain the rule of priority by appropriation and Kansas saw fit to adopt the strict rule of the common law.

POINT XIII.

The Lands in Controversy Never Possessed Common Law Riparian Privileges.

From still another point of view, let us examine the question to determine to what extent the lands in question are possessed of or subject to riparian privileges.

In Colorado, all the water of the streams is declared to be subject to appropriation, and the common law rule of riparian rights is held to have never been part of the law of the state. In Kansas, the same is practically true of all the lands brought into the case. While various allegations of

early settlement are made in the bill, the earliest dates at which titles to Kansas lands are specifically pleaded as having passed from the government are in the 70s, though there are some indefinite allegations of titles running back into the 60s.

The rights of the State of Kansas, as an owner of land, are pleaded as having attached not earlier than May 19, 1873, and as to one tract, as having attached in 1889; and it is said that the riparian rights of the State of Kansas are superior to any Colorado rights of appropriation attaching subsequent to those dates (page 14). This position is pregnant with the admission that the riparian rights in Kansas are subordinate to all earlier appropriators in Colorado; and as the appropriations in Colorado have been continuous for half a century, it is difficult to see how, even upon the Kansas theory, a suitor in equity could ask that the early Colorado rights be embarrassed by restraining a renewal of their corporate existence.

But taking the bill as a whole, it is evident that the complainant proceeds upon the theory that all of the Colorado diversions are illegal as to all of the Kansas riparian claims, and that the doctrine of riparian rights attached to all lands the moment they passed from the federal government. Upon this theory, a contention is made that, if successful, would destroy the prosperity of the State of Colorado and ruin thousands of its citizens; and the relief prayed distinctly asserts this general application of the rule of the common law by seeking to prevent further appropriations in Colorado.

Originally all of the lands in question in both states were part of the public domain of the United States, save such portions in Colorado as were included in Mexican grants confirmed by congress. The government itself might have imposed any theory of law it pleased upon the land and the water. It did not, however, consider the common law rule

as applicable in the arid region, nor has it ever so considered the case. It never dealt with the lands as possessing strict riparian rights, and does not so treat them to-day. On the contrary, it has always treated the water as subject to appropriation, and the riparian lands as accordingly charged with this dominant servitude.

The necessities of life required this, and the government recognized what its predecessors and the western pioneers found to be the fact. That the matter might be set at rest, congress, by act, approved July 26, 1866 (14 Stat., p. 253), provided that whenever, by priority of possession, rights to the use of water for mining, manufacturing, etc., have accrued and are recognized according to local customs, laws and decisions, the owners shall be protected. By later legislation of July 9, 1870, embodied with the act of 1866, in section 2339, *Revised Statutes,* it was provided that patents, homesteads, etc., should be subject to vested and accrued water rights, etc.

Here was a clear evidence of the intention of the government to say that the common law doctrine of riparian rights did not attach to government lands in the arid West. What the local customs evidenced the necessity to be, that the government itself approved. The common law rule was recognized as having no place here; and that separation of water and riparian ownership which the necessities of life decreed was recognized as applicable to the government title.

The policy of the government was thus declared. It at once impressed upon the remaining lands owned by the government the servitude of diversion of water for beneficial uses. It can not be said that the rule of riparian rights had theretofore attached to the government title, and that the government saw fit to waive that rule in particular instances. Upon the contrary, as this court has said, the protected rights were those which accrued from the necessities of the country, and which congress recognized and encouraged and was

bound to protect, even before the passage of the act of 1866, and that that act was not the establishment of a new claim, but the voluntary recognition of a pre-existing right.

Broder vs. Water Co., 101 U. S., 274-276.

It can not be said that the intention of congress was that, as each tract of land in the arid region passed from the government, it should do so charged with the servitude of all earlier appropriations, and at the same time possessed of common law riparian rights as against all subsequent appropriations. The theory of the government was that the common law rule had never been applicable to these lands. It can not be said, then, that the government passed title with common law riparian privileges. Such a doctrine would make the federal legislation meaningless, for it would be a practical impossibility to distribute the water of a stream on such a theory.

The purpose of the government was to decree the lands subject to the rule of prior appropriation, and the act of March 3, 1877 (19 Stat., 377), providing for the sale of desert lands, further expressed this underlying doctrine and made it applicable in a special way to a particular class of lands. This act decreed the right to water to depend upon prior appropriation; and, almost in the words of the Colorado Constitution and decisions, declared the surplus waters of all unnavigable streams on the public lands to be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

If the theory set up in the bill were correct, the first appropriator of water on the public land had a good title as against the government, and at the same time all appropriations made subsequent to the passing of his land from the government are illegal as to him. In other words, the whole

theory of the law, as recognized by congress to be applicable to the public lands, was a farce, and the value of those lands was practically gone when one tract passed from the government; and the reclamation of the public lands and the conquest of the arid West was a thing subject to overthrow. Upon the contrary, the very phraseology of the early acts showed the purpose of congress in announcing a rule of property consistent with that recognized in the territory itself, and that the same servitude should be impressed upon the land whenever it might be sold. The government treated the land as subject to both past and future appropriations. Its grantees took no better title; and, under the law, if they desired to assert a special interest in the waters, they could do so by beneficial appropriation. When their titles vested in them, they got from the government no common law riparian rights; and, like the government, they held the lands subject to the necessities of the country, crystallized into laws, customs and decisions.

As against the government, these grantees and the states in which they lived could not have set up the common law doctrine so as to embarrass the disposition of the remaining public lands and the waters of the streams. The most that can be said is that, as to new appropriators, they took their land titles subject to the laws of their own states or territories; and as all the arid states (including the portion of Kansas in controversy) recognized riparian titles to be subject to future *bona fide* appropriations, as did the government itself, there was no change in the character of the title consequent upon the passing of that title from the government.

In the very first case upon the subject in this court, it was said that the common law was not applicable, and that the government had no occasion to apply that doctrine; that the settlers on public lands recognized the inherent justice of the rule of priority by appropriation, and that it was en-

forced by the courts in the arid region. So, too, it was admitted that even without express legislation confirming the new rule, the various legislatures spoke of that rule as though it had been established by specific legislation.

Atchison vs. Peterson, 20 Wall., 507.

In the next case the doctrine was further elaborated, and it was held that, though the congressional act of 1866 referred to the recognition of the right by "local customs, laws and decisions of courts," the union of these three conditions was not essential to the perfection of a right by priority. It is true that in that case the question arose between trespassers on the public domain, and the rights of private riparian owners were not involved; but the principle of the decision was the recognition of that law of title which was generally adopted in the arid states.

Basey vs. Gallagher, 20 Wall., 671.

It is to be noted that these decisions and statutes recognize the territorial customs and laws upon the subject to be equally effective with state legislation. As this court says in the *Rio Grande* case, at page 704, there was a recognition of the common law in some form in all of the western states, but at the same time, the rule of action regarding water in the arid lands grew up with that recognition. The recognition of the common law in a modified form did not conclude the question, and the common law rule upon this score was never treated as adopted *in toto.* And, as the waters could be diverted without serious interference with the navigability of the streams into which they flowed, congress intended to give its consent to the new rules, though in direct departure from the common law.

Rio Grande Company case, page 706.

When the states began to legislate upon the matter, rules were adopted as different as the climatic conditions in the various states. For instance, California, by its code of 1873, section 1422, recognized in part the common law doctrine of riparian rights, and at the same time the right of appropriation was treated as a modified form of the common law doctrine occasioned by the necessities of the case.

In 1887 (Stat. 1887, 114) the legislature of that state, however, repealed the section declaring the existence of the riparian doctrine, at the same time preserving the statutes regarding the appropriation of water. In other words, as this state has one wet season and one dry season, the rule now proceeds on the theory that as irrigation is necessary, the riparian owner shall have a modified right to the use of water for that purpose, even though such user may appreciably diminish the flow for an earlier riparian owner.

Harris vs. Harrison, 98 Cal., 676.

In Nevada the common law rule was at first recognized, but the contrary is now the established doctrine.

Van Sickle vs. Haines, 7 Nev., 249.

Bliss vs. Grayson, Nev., 1889, 56 Pac., 231.

As is naturally to be expected, some of those states which in aridity occupy an intermediate position, have declared the rule in modified form; but in that great area which constitutes what is generally known as the arid region, there is practically no difference in the rule. So, too, the early cases disclose the fact that in some states the courts whose judges, by training, were impressed with the common law doctrine, had some hesitancy in recognizing the fact that the natural conditions required a different rule. And this is evidenced in the early Montana cases, even though the custom had at that time been generally established among the people.

The fact that when the government passes title that title is to be tested by the rules of the jurisdiction touching the use of water, is illustrated in *Sturr vs. Beck,* 133 U. S., 541. There the defendant's riparian title related back to March 25, 1879, and the title of the plaintiff to May 15, 1880. About the latter date, the plaintiff went upon the defendant's claim and diverted the water of the stream; and this court held that that appropriation was unlawful as against the defendant. The case arose in Dakota, and the opinion shows that when title passed from the government it became vested under the Dakota statutes with riparian privileges somewhat similar to those of the common law. The Dakota statute provided that the owner of the land should not prevent the flow of a natural stream and this riparian doctrine was limited only so far as to entitle the holder of the title to the "usual enjoyment of the waters" without interference with any prior right or claim. There was no question raised as to the plaintiff's right to take the water as against the government, but the contest was between private claimants, both bound by the laws of Dakota; and this court held that, as the rights of the defendant related back to his filing, the riparian privileges attaching to his land under the local laws could not be invaded, for his prior possession of the land gave him a prior claim to the water under those laws.

The common law doctrine of riparian rights was entirely swept away in the territory where this controversy arises. Or, to state the rule more correctly, that doctrine never existed. When the lands in question passed from the government, they received no common law riparian rights from the government, nor were such rights part of the law of the territory. Regardless, then, of any question arising between conflicting theories asserted by the states in controversy, it is apparent that neither in Colorado nor in Kansas did such common law rights attach to the lands in question.

In both states the man who saw fit to improve his estate by using the water for beneficial purposes obtained a right through that use, as against all persons save prior appropriators. If all the lands in uestion now lay in either of the two states, or, if the State of Colorado had never been segregated from the territory of Kansas, the same rule would have to be affirmed. As they lie in different states, the affirmance must follow for added reasons.

It is strange that this controversy should arise after the practice and the law have been settled for many years. The lands in western Kansas and in eastern Colorado are covered by hundreds of ditches, and no controversy is made here as to conflicting priorities between those ditches, for that would disclose the real nature of the proceeding. After waiting for at least a generation, the State of Kansas pretends to discover some law which, though not binding upon her own citizens, she wishes to enforce upon a sister state; and that, too, regardless of the fact that even at common law, the twenty years' enjoyment admitted by the State of Kansas to have been practiced by some of the ditches which she wishes to close would bar all right.

Atchison vs. Peterson, 20 Wall., page 512.

The interests affected by this contention are beyond calculation. The case affects not only the State of Colorado and the undisclosed ditch owners of the Arkansas, but its strikes at the law of the whole arid region and at the rights of property owners on every stream which may touch two states. If the bill could be successfully maintained, it would mean ruin to the State of Colorado, and disaster to every state in the arid region from which a stream flows into another state; for the lower state would simply assert the same theory, and after having acquired the undisturbed flow of the water to

its territory, nothing could cause that water to flow back again, and it would simply be used for the same purposes of irrigation. Even if there were any technical merit in the bill, no court would decree the destruction of such vast property interests for such a purpose, and no court would enter such a judgment simply to vindicate an abstract principle. Even the decree sought could not be enforced without compelling the defendant to deny her people the protection of her own laws and those of congress.

It is unnecessary to discuss the case further. The bill is not only technically imperfect and lacking in jurisdictional requirements, but it seeks relief which necessitates the abrogation of federal and state laws, the repudiation of a state's freedom of action, and of a national policy; and, upon the merits of the underlying legal contention, the case stated is without equity.

We respectfully submit that the demurrer should be sustained and the bill dismissed.

Respectfully submitted,

Chas. C. Post

Attorney General of Colorado.

Charles S. Thomas

Luther M. Goddard

Platt Rogers

Henry A. Dubbs.

Of Counsel.